

## Mathias: Response to Comments

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## RESPONSE TO COMMENTS

CHARLES MCC. MATHIAS, JR.

I am moved by these very eloquent and learned comments to make a few remarks. As is evident tonight, the dichotomy between those who believe in original intent and those who oppose it is very deep. This division has been well captured by Justice Thurgood Marshall's recent comment that "[w]hile the Union survived the civil war, the Constitution did not."<sup>1</sup>

I would like to contrast Marshall's observation with an experience I had some years ago. I was walking down a corridor in the House of Representatives, and I encountered a member of Congress from Georgia whose name was Tick Forrester. Even though he was on the opposite side of the political hemisphere to Justice Marshall, he too had come to the conclusion that the Constitution was finished. In fact, as he wandered by I heard him say, "She's gone, she's gone."

I asked, "Who's gone, Tick?"

He replied, "The Constitution, she's gone. No use my standing up here in Washington trying to save her."

So you have Justice Marshall from one perspective and Tick Forrester from another, both thinking that the Constitution is "gone" beyond repair. Original intent, in this respect, has come full circle and cannot be reconciled with the current state of the Constitution.

I am reluctant to say any words in response to Bob Goldwin. After all, someone who has read and taught the great books is probably invulnerable to any kind of rebuttal. But he did make an interesting statement about ordered liberty by raising the example of the British.

I would remind Mr. Goldwin that he could at this very moment enter any bookstore located in the United States and buy a spy book describing the intelligence operations of the British MI5. This he would be unable to do in England tonight.<sup>2</sup> That is because we have ordered liberty; the British do not. They have liberty of a very admi-

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1. T. Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii 7 (May 6, 1987) (available at the *Maryland Law Review*).

2. The particular book I am discussing is P. WRIGHT, *SPYCATCHER* (1987).

rable kind, but it is not ordered liberty because the Parliament in its wisdom has the power to ban any book. Parliament, in its wisdom, could also decree that all redheads be jailed, there being no ordered structure that prevents this kind of arbitrary action. The good sense of the British restrains Parliament most of the time, but they do not have the kind of liberty that we have in this country.

The speakers have also raised the question of whether or not the founders would be surprised at the recurring conflicts over the power to make war. I persist in my theory that the founders would indeed be surprised. In fact, they would be amazed at the current Iran-Contra scandal because they expressly empowered the Congress to issue "Letters of Marque."<sup>3</sup> If Colonel North really had wanted to start a private war in Nicaragua, he merely had to take General Secord to Congress to obtain a "Letter of Marque."

Bruce Fein claims that the last word on original intent is how the judges interpret the Constitution. Without violently disagreeing with him, I would like to add that judges are not the only persons who must interpret the Constitution. I believe there is a positive obligation upon the President of the United States and upon each member of Congress—House and Senate—to interpret the Constitution in the course of their daily duties.

I have heard members of Congress say, "I'm not going to worry about constitutionality. I'm going to leave that to the judges." But members of Congress take an oath to support and defend the Constitution, just as the President and the judges do. Thus, the legislators also have an obligation to observe the Constitution in their votes as well as in their actions.

Bruce Fein also mentioned the one person, one vote case,<sup>4</sup> stating that the decision sprang from the Supreme Court's head, that it was suddenly decided, and that it was a hallmark of judicial abuse. Since I lived through that period, I feel compelled to comment. Here in Maryland we had congressional districts that ranged from the first district on the Eastern Shore which had about 100,000 people, to Prince George's County which had between 700,000 and 800,000 people, and my own district in western Maryland which had around 750,000 people. There existed a high degree of disparity in the state's distribution of voting power. This did not spring from judges' heads. This sprang from counting people.

Behind the creation of Congress was the guiding principle that

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3. U.S. CONST. art. I, § 8, cl. 11.

4. *Reynolds v. Sims*, 377 U.S. 533 (1964).

the states were to be represented equally in the Senate regardless of population, and the House of Representatives was to represent people. The general principle was evident: states with more people had more Representatives and thus more power. Clearly, some kind of rough population-based equality was intended.

Perhaps, a 100-percent disparity in the size of congressional districts might have been tolerated for a long time, and a 10-percent disparity could have been endured for even longer, but a 700-percent disparity was just too much. The intolerance for such a great disparity did not spring from the judges' heads, but from the deadlock of the legislative bodies in this country. The General Assembly of Maryland, when I was serving there, wrestled with the problem of equal representation, but for political reasons could not break the deadlock. By a curious coincidence, when I was elected to Congress, we were wrestling with the problem there as well. Neither the House of Representatives nor the Senate could break the political deadlock that created this enormous disparity in the size of congressional districts.

Eventually, the guiding principle became clear, causing checks and balances to be imposed. What the legislative branch of the government was unable to accomplish at either the state or federal level, the courts had to accomplish. Thus, the decision of the court did not arise from the judges' heads, but from the very constitutional pressures that forced the judges to act.

Jack Rakove was so supportive of my views that I regret having to point out to him that he has struck a soft spot with respect to original intent in speaking about the intent of the ratifiers of constitutional amendments. I was one of the ratifiers of the fourteenth amendment. Maryland did not ratify the fourteenth amendment until 1959. I am willing to go to the Department of Justice to give Attorney General Meese my original intent on the fourteenth amendment. There can be no doubt that it is going to be an original one.

When I referred in my speech to some newly discovered shred of historical evidence, I could not have possibly anticipated that Herman Schwartz was going to pull out Roger Sherman's draft of the Bill of Rights, but he made an interesting and valid point by doing so. I think he demonstrated that government simply cannot be contained within the bonds of language. As he says, for example, the first amendment restriction against any law affecting freedom of speech must be viewed broadly as cases arise.

I wish we had time to talk about the future of the Constitution.

The fourth amendment will be put to great tests as we develop new technologies that will make sophisticated eavesdropping more and more likely—eavesdropping without any kind of physical intrusion of the sort envisioned by the founders when they prohibited unlawful searches and seizures.<sup>5</sup> Rather, they had in mind the British soldiers who rifled the desks and entered the homes of the colonials before the Revolution.

We will have to address other sophisticated questions. We now can put a relatively unoppressive electronic anklet on a convict's ankle that can monitor the convict's activities and sound an alarm if the convict steps outside the prescribed area of liberty. It would be a much more economical way of handling convicts than putting them in jail. But it raises many questions concerning constitutional rights.

There is also the question of what kind of rights, if any, inanimate objects might acquire as they approach human intelligence. Robots are presently performing very sophisticated tasks, and there is a projection that they may someday acquire a capacity akin to intellectual competence. What rights will these robots or those who put them in motion have? These are fascinating constitutional questions that will probably be raised in the near future.

In Hollywood—where, of course, it had to happen—a man who owned a robot decided to put it toward some gainful purpose. He gave it a bundle of advertising cards and sent it down the sidewalk to distribute them. The robot was promptly arrested for soliciting business without a license. The constitutional rights of robots are thus already upon us.

Finally, there is the question of outer space and its implications on constitutional rights. I imagine that I feel as the Portuguese must have felt 500 years ago when they stood on the edge of the ocean about to launch the great age of exploration. We are presently very close to a great age of exploration in space. We have recently made the first, tentative voyages, but will the Constitution follow the astronauts into space? Will American space colonies be

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5. U.S. CONST. amend. IV declares:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The legality of a particular mode of surveillance is presently governed by The Omnibus Crime Control and Safe Streets Act of 1968, Title III, § 801, 18 U.S.C. §§ 2510-2520 (1982 & Supp. III 1985).

governed by all the rights and privileges that are guaranteed by the Constitution?

I hope that 100 years from now another session like this one is convened to consider how the Constitution has succeeded in addressing such issues.<sup>6</sup>

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6. For an insightful discussion of this topic, see Tribe, *The Constitution in the Year 2011*, 18 PAC. L.J. 343 (1987).